ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning Rates for Dominant Carriers	)	CC Docket No. 87-313
	)	
Revisions to Price Cap Rules for AT&T	)	CC Docket No. 93-197

AT&T COMMENTS

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SUMMARY

In this Further Notice of Proposed Rulemaking ("Further Notice") the Commission tentatively concludes that AT&T's promotional tariffs and optional calling plans ("OCPs") should remain subject to price cap regulation, and proposes extensive changes in the price cap rules to restrict or eliminate the price cap index credits currently accorded OCPs and promotional filings. These measures are unjustified, however, because AT&T's pending motion to be reclassified as a nondominant carrier establishes by overwhelming evidence that the entire interexchange market is now fully competitive, and that both as a matter of law and sound public policy AT&T must be allowed to compete on an equal footing with its interexchange competitors.

AT&T's Comments in this proceeding demonstrate that there is no longer any basis for price cap regulation of AT&T's Basket 1 services. The three principal factors that the Commission has examined when measuring the level of competition -- supply elasticity, demand responsiveness, and market share -- all show that the entire interexchange market is fully competitive for all customers at all levels of usage. Under applicable Commission precedents, AT&T thus lacks market power and is entitled to be classified as nondominant. Because price cap regulation was intended only as an interim regulatory

scheme until the advent of competition rendered it unnecessary, the imposition of new regulatory burdens such as proposed by the Further Notice (or, indeed, the continuation of price cap regulation at all) would not advance the Commission's goals of ensuring just, reasonable and nondiscriminatory rates through marketplace competition.

In all events, many of the specific rules that are proposed in the Further Notice should not be adopted because they lack any reasoned basis and would be arbitrary and unlawful. For example, the rules would combine OCPs and "self-selected" promotions into a new Alternative Price Plan ("APP") category, limit those offerings to a maximum of 90 days, and deny any price cap credit until the APP becomes a "permanent offering," which could be delayed up to eight months after initial filing. The Further Notice provides no reasoned explanation for treating APPs differently from other rate reductions for price cap purposes, as the Court of Appeals has held is necessary in order to justify denial of index credit. Nor does the Further Notice provide a reasoned basis for the 90 day limit on APPs. That limit, and other proposed restrictions on these offerings, would unfairly impede AT&T's ability to compete with other interexchange

carriers (none of whom is subject to comparable restrictions) and to meet marketplace demand for services that consumers want.

The Further Notice also seeks comment on whether the Commission should mandate either a new "basic rate index," replacing the existing residential index, or a "safety net" proposal for low-volume and low-income customers in order to ensure that basic schedule increases do not threaten universal service, or other Commission goals. The Commission's proposals proceed from the mistaken premise that AT&T's basic MTS rates must be subject to special regulatory treatment because the provision of those interexchange services is not yet competitive. Because vigorous competition exists for all services and all customers in the interexchange market, market forces will by themselves ensure that just, reasonable and non-discriminatory rates are achieved for all residential consumers.

There is also no basis for any concern that the widespread use of promotional tariffs may somehow adversely impact universal service. To the contrary, Commission studies show that telephone "penetration" has actually increased during the time that AT&T has been employing promotional discounts in response to intense marketplace competition. Nor is there any basis for concern about service in non-equal access areas because

over 97 percent of access lines nationwide have already been converted to equal access, and even the small number of non-equal access customers have dial access to AT&T's competitors. Similarly, there is no evidence that the level of interexchange rates has increased the denial of local service for non-payment of interexchange charges.

Finally, AT&T's mass market discounts and promotions raise no tenable issue of unreasonable discrimination. These offerings are a product of intense competition for residential long distance customers, and reflect a legitimate balancing of prices with costs. Indeed, residential customers have benefited enormously from this competitive discounting, saving well over $1 billion annually. Any policy which discouraged such discounts would harm consumers and would be antithetical to the Commission's pro-competitive, pro-consumer policies.

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AT&T COMMENTS

AT&T Corp. ("AT&T") hereby comments on the Commission's May 18, 1995, Further Notice of Proposed Rulemaking ("Further Notice") in these proceedings.[1]

Just as it finally appears ready to address AT&T's long-pending motion to be reclassified as a nondominant carrier, which is supported by overwhelming (and unrefuted) evidence that the interexchange market is now fully competitive, the Commission has simultaneously -- and irreconcilably -- revived these long-dormant rulemaking proceedings to propose further restrictions on AT&T's pricing flexibility for residential services in price cap Basket 1. In particular, the Further Notice tentatively concludes that promotional tariffs and optional calling plans ("OCPs") should remain

[1] Policies and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, Further Notice of Proposed Rulemaking, FCC 95-198, released May 18, 1995.

subject to price cap regulation, and that they should be burdened by extensive additions to the price cap rules that would restrict (and in many cases eliminate entirely) the index credit currently accorded OCPs and promotional filings.

Specifically, the Further Notice (¶¶ 37, 41) tentatively concludes that "self-selected" promotions and OCPs, which it newly classifies with OCPs as Alternative Pricing Plans ("APPs"), should initially be limited to no more than 90 days duration, and should be kept outside of price caps and not receive any price cap credit during this period. Id., ¶¶ 46-48, 53. On the last business day of the 90-day period, AT&T could extend the expiration date for 30 days, in order to permit the conversion of the APP to a permanent offering with price cap credit, by filing tariff revisions on not less than 14 days notice.[2] AT&T would then be allowed index credit on the date the permanent filing became effective, limited to the annualized actual demand for the APP.[3]

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[2] If a longer period were required for review by the Common Carrier Bureau, AT&T could be required to defer tariff revisions introducing the permanent offering up to 120 days to avoid interruption of the offering. Further Notice, ¶ 53.

[3] AT&T would also be required to file quarterly "true-up" reports to update the actual demand for the initial year that the new APP is under price caps, in order to "refine" the calculation of pricing headroom. Further Notice, ¶¶ 55-56.

In addition, the Further Notice seeks comment on a new, narrowly banded "basic rate index," limited exclusively to undiscounted basic MTS rates, to replace the current residential index in Basket 1 that measures residential subscribers' usage of all Basket 1 services. Like the restrictions on AT&T's promotional rates described above, this proposal would inappropriately fetter AT&T's ability to respond effectively to competition in the rivalrous interexchange marketplace. Such requirements are unwarranted, even if they were applied "symmetrically" to both AT&T and its numerous interexchange competitors; they are all the more unsupportable, however, because the burden of these proposals would fall solely upon AT&T, thereby increasing the unfairness of the Commission's current lopsided regulatory regime.[4]

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[4] Assuming that there were any further need to continue price cap regulation of AT&T (which there is not), AT&T does not oppose the Commission's additional proposal (Further Notice, ¶¶ 68-70) to limit exogenous cost treatment of accounting standards changes to those which result in economic cost changes, in the same manner as the Commission recently adopted for the LECs. See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, FCC 95-132, released April 7, 1995 ("LEC Price Cap Review Order"), ¶¶ 292-320. However, AT&T strongly opposes the Commission's companion proposal to require a rulemaking, waiver, or declaratory ruling merely to obtain exogenous treatment of cost changes not already so classified under AT&T's price cap plan. See proposed Section 61.44(c)(5). This procedure was adopted for the LECs because the Commission concluded that attempts to obtain exogenous treatment of cost

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As AT&T shows below, there can be no justification in law or sound public policy for a result that is so seriously at odds with the interests of consumers. Indeed, as shown in the accompanying Statement of Robert D. Willig, Professor of Economics and Public Affairs at Princeton University, the Commission's proposals are unsound as a matter of economic theory and counterproductive to the interest of maximizing consumer welfare that the Further Notice seeks to advance.

I. IT WOULD BE ARBITRARY, CAPRICIOUS, AND CONTRARY TO THE COMMISSION'S OBJECTIVES TO INCREASE REGULATORY RESTRICTIONS ON AT&T WHEN THE RECORD ESTABLISHES THAT AT&T LACKS MARKET POWER AND SHOULD BE CLASSIFIED AS NONDOMINANT.

The Commission's stated purpose in this proceeding is to continue the process of "foster[ing] greater competitiveness in the interexchange market" and permitting the Commission to "remove more of AT&T's services from price cap regulation." Further Notice, ¶ 33. To accomplish this, the Commission states that it

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changes through overlapping tariff filings by multiple carriers made the review process "more cumbersome and more subject to manipulation." LEC Price Cap Review Order, ¶ 315. By contrast, AT&T is the sole interexchange carrier subject to price cap regulation, and the record demonstrates no threat to orderly Commission review of its filings requesting exogenous treatment of additional cost changes.

"seek[s] to reduce regulatory burdens on AT&T" that no longer serve the public interest (id. at ¶ 34); that it intends to "provide AT&T with greater flexibility to respond to developments in the interexchange marketplace" (id.); and that it wants to "simplify price cap procedures" (id.). The Commission seeks comment on the extent to which its proposed rules promote these goals. See id. at ¶¶ 33-35.

Contrasted with these laudable objectives, the Further Notice is an unwarranted step backwards. Rather than promote the Commission's stated objectives, most of the proposed rule changes would subvert them. As explained in more detail in Sections II and III, infra, the proposed rules would make price cap regulation more complex by creating the need for additional filings and submissions that are not required, even under the current unequal rules. The new rules would also severely hamper AT&T's ability to respond to competitive developments. This reduced flexibility would inevitably impede, rather than further, competition in the interexchange market. As the Commission recognizes, reliance on price cap regulation in a competitive environment provides no benefits and simply facilitates anticompetitive behavior on the part of AT&T's rivals.[5] Moreover, neither the

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[5] See, e.g., Revisions to Price Cap Rules for AT&T Corp., CC Docket No. 93-197, Report and Order, 76 R.R.2d 1375,

(footnote continued on following page)

Commission in the Further Notice, nor any party in the prior phases of these dockets, has identified any "harm" to consumers or to the public interest which the rule changes proposed here could conceivably address.

Almost two years ago in its Reclassification Motion, AT&T demonstrated that all of its services -- including Basket 1 residential services -- are subject to vigorous, robust competition.[6] Because of this competition, AT&T no longer has any market power in the interexchange market. Any attempt by AT&T to engage in supracompetitive pricing would necessarily fail, because it would result in a substantial loss of customers to competitors.[7] In the two years since AT&T filed its

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1381 (1995), ¶ 27 ("Commercial Services Order"); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411 (1994) ("Mobile Services Order"), ¶ 178.

[6] See Motion for Reclassification of American Telephone and Telegraph Company as a Nondominant Carrier, CC Docket No. 79-252, filed September 22, 1993 ("Reclassification Motion"); Reply Comments of AT&T, CC Docket No. 79-252, filed December 3, 1993; see also Ex Parte Presentation in Support of AT&T's Motion for Reclassification as a Nondominant Carrier, CC Docket No. 79-252, filed April 20, 1995 (updating evidence submitted in 1993) ("Reclassification Ex Parte"); additional ex parte in id., filed June 12, 1995; Reply Comments of AT&T, CC Docket No. 79-252, filed June 30, 1995.

[7] See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities

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reclassification motion, competition has intensified to new levels, which has made price cap regulation even more burdensome and obsolete.[8]

In short, the record compiled in the reclassification proceeding (which AT&T formally incorporates by reference here) demonstrates conclusively that the market for AT&T's Basket 1 services is fully competitive. In light of that record and the Commission's precedents, AT&T is entitled to be reclassified as a "nondominant" carrier. Moreover, given that record, any new Commission rules imposing additional regulatory burdens within the price cap system would be arbitrary and capricious and contrary to the public interest.

A. AT&T's Basket 1 Services Are Subject To Substantial Competition.

By the very standards the Commission has applied in the past, AT&T has no market power in the interexchange market, including the market for any of its Basket 1 services. Specifically, when measuring the level of competition in the interexchange market, the Commission

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Authorizations Therefor, CC Docket No. 79-252 ("Competitive Carrier Proceeding"), Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308, 334-38 (1979); First Report and Order, 85 F.C.C.2d 1, 31 (1980).

[8] See generally Reclassification Ex Parte, pp. 9-13.

has examined three principal factors: supply elasticity, demand responsiveness, and market share.[9] In its motion for reclassification, AT&T demonstrated that under these criteria the market for all of AT&T's services is robustly competitive.[10]

First, it is well established that AT&T's competitors have enormous excess capacity and could absorb a substantial portion of AT&T's traffic in a short amount of time.[11] Indeed, the Commission has acknowledged this many times in streamlining price cap regulation for AT&T's other services.[12] Interexchange carriers, however, provide all interexchange services over the same facilities, and therefore the same degree of supply elasticity necessarily exists for Basket 1 services as well.

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[9] The Commission has examined these factors both in the context of classifying AT&T as a dominant carrier (see Competitive Carrier Proceeding, First Report and Order, 85 F.C.C.2d at 21-28) and in the context of streamlining price cap regulation for AT&T's services (see Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880 (1991) mod. on reconsideration, 7 FCC Rcd. 2677 (1992) ("IXC Order"); and Commercial Services Order, 76 R.R.2d at 1379-80, ¶¶ 17-26).

[10] For a fuller discussion, see Reclassification Motion at 5-17; Reclassification Ex Parte at 13-35, Attachment G (Willig/Bernheim Aff.), pp. 130-171.

[11] Reclassification Ex Parte at 15-16; id., Attachment B.

[12] See, e.g., Commercial Services Order, 76 R.R.2d at 1380, ¶ 22-25; IXC Order, 6 FCC Rcd. at 5888.

Thus, if AT&T were to charge supracompetitive prices for Basket 1 (or any other) services, AT&T's competitors clearly have the capacity to lure away large numbers of AT&T's customers immediately. Indeed, because of the enormous excess capacity in the industry and the low cost of adding new customers, all of the interexchange carriers have powerful incentives to try to bring additional customers onto their networks.[13] With respect to competition, this excess capacity creates an inherently unstable situation that effectively precludes the possibility of any oligopolistic collusion.[14]

Second, Basket 1 customers are well aware of their choices in the interexchange market, and are ready and willing to switch carriers whenever it suits their needs. The most dramatic illustration of this is the rate of customer "churn" in recent years, which has been increasing rapidly. In 1993, residential customers

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[13] See Commercial Services Order, 76 R.R.2d at 1380, ¶ 26.

[14] See, e.g., Willig/Bernheim Aff., pp. 131-35. Indeed, as Willig and Bernheim explain, the competitive nature of the underlying Basket 3 services ensures that all Basket 1 services are competitive as well. Because there is robust competition for Basket 3 services -- as the Commission has found -- non-facilities based entrants will always be able to purchase bulk wholesale services at rates that closely mirror costs, which would allow them to undercut Basket 1 carriers if those carriers attempted supracompetitive pricing. As Willig and Bernheim observe, "economic logic inevitably implies that Basket 1 services inherit the competitive characteristics of Basket 3 services." Id. at 135.

changed carriers 18 million times; in 1994, competition between the IXCs intensified even further (with vigorous marketing campaigns to introduce new services, discounts, and features), resulting in residential customers making 27 million changes.[15] Right now, customer churn is running at an annual rate for 1995 of 30 million.[16]

Moreover, many of the customers who changed carriers in 1993-94 were low volume users paying basic schedule rates. AT&T residential customers who had less than $10 in average monthly usage switched carriers 7.8 million times in 1993 and 10.4 million times in 1994. This represents about 40 percent of the total customer churn over this period.[17] Indeed, low volume users often have proportionally greater incentives to take advantage of promotions tied to changing carriers than higher volume consumers do because carriers often offer lump sum rewards for switching.[18]

This level of churn for low volume users is powerful evidence that AT&T faces vigorous competition for

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[15] See Reclassification Ex Parte at 33-34. Of the 27 million changes in 1994, 19 million were by customers who only made one change during the year. Thus, about 1 in 5 residential customers changed carriers at least once last year.

[16] See id. at 34.

[17] Id.

[18] Id. at 34 n.89.

all of its Basket 1 services. AT&T simply has no power to engage in supracompetitive pricing for these services, because customers have demonstrated that they are more than willing to switch carriers. Here again, the evidence makes clear that price cap regulation of Basket 1 services has outlived its usefulness, and adding new burdensome rules would be contrary to the public interest.

Third, the steep decline in prices that has occurred in the interexchange market since divestiture is another strong indicator of competition. AT&T's average revenue per minute ("ARPM") declined by 63 percent between 1983 and 1992, and ARPM for the industry as a whole fell by almost ten cents per minute net of access between 1985 and 1992. This phenomenon continues today: in the first quarter of 1995, AT&T's minute volume grew by 8.4 percent, but its revenue grew at only about half that rate. The reason, of course, is that customers continue to migrate to the lower priced services that competitive market forces have made available to them.[19]

Fourth, indisputable evidence also demonstrates that Basket 1 customers have a broad array of choices from numerous competing IXCs.[20] Equal access is now available

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[19] See Reclassification Ex Parte at 32-33.

[20] See Competitive Carrier Proceeding, First Report and Order, 85 F.C.C.2d at 21 (deeming relevant the number and size of competing carriers, taking into account the financial and other resources of such carriers and

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on over 97 percent of the nation's telephone lines.[21] Thus, virtually all Basket 1 customers have 1+ access to multiple interexchange carriers.[22] Indeed, there are some 458 carriers that purchase equal access today, nine of which purchase access in at least 45 states.[23]

Moreover, AT&T's competitors have become increasingly strong companies and have substantially diminished AT&T's share of the interexchange market. MCI, for example, had revenues of $13.3 billion in 1994 and its market share as a percentage of revenues grew to 19 percent in 1994. Similarly, Sprint's revenues for 1994 were $6.8 billion, and its market share was 9.7 percent.[24] Both MCI and Sprint have also made themselves even stronger competitors by entering into alliances with large foreign telecommunications firms.[25]

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affiliations with other carriers through mergers or acquisitions).

21 "Trends in Telephone Service," Industry Analysis Division, Common Carrier Bureau, February 1995, Table 12 ("Trends in Telephone Service").

22 Even for the less than three percent of the country without equal access, customers often still have access to competing carriers through Feature Group A or B access. See Reclassification Ex Parte at 20 n.49.

23 "Trends in Telephone Service," Tables 23 and 24.

24 See Reclassification Ex Parte at 21-22.

25 MCI has entered into a partnership with British Telecom, which has given MCI a cash infusion of

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In addition, other entrants have gained 13 percent of the market and in some cases have grown to be quite large and thriving companies. For example, LDDS recently purchased WilTel for $2.5 billion, creating a formidable competitor that had a combined $3 billion in revenues in 1994. Similarly, Frontier Corp. recently announced its intention to buy ALC Communications for $1.5 billion.[26]

For all of these reasons, based on the criteria the Commission has set forth to determine dominant or nondominant status, AT&T is entitled to be reclassified now as a nondominant carrier. AT&T's motion for reclassification has been pending for almost two years, and reclassification would moot all of the issues raised in the Further Notice. Therefore, without further delay, the Commission should reclassify AT&T as a nondominant carrier in Docket No. 79-252.

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$4.3 billion. Sprint recently announced completion of a partnership with France Telecom and Deutsche Telekom, and it is also actively pursuing international ventures with Call-Net in Canada and Telmex in Mexico. See Reclassification Ex Parte at 21-22.

[26] See Reclassification Ex Parte at 23.

B. Because The Market For Basket 1 Services Is Fully Competitive, The Proposed Rule Changes Would Be Arbitrary, Capricious, And Contrary To The Public Interest.

The extensive record compiled in the reclassification proceeding (and incorporated here) demonstrates that the interexchange market is fully competitive, and that continued price cap regulation of AT&T's Basket 1 services has become both unnecessary and counterproductive. The Further Notice, however, proposes modifications to the price cap regime that would actually increase administrative burdens and costs for AT&T, and reduce AT&T's flexibility to respond to competitive developments in the marketplace.[27] Because the record

[27] The Further Notice also proposes a number of changes in the structure and application of the price cap rules which, while not objectionable in themselves, amount to little more than tinkering with the price cap machinery and do not recognize that the consumer marketplace, like the commercial services, is fully competitive.

Specifically, the Further Notice (¶ 40) proposes to collapse four of the six existing domestic MTS service categories in Basket 1 (domestic day MTS, domestic evening MTS, domestic night/weekend MTS, and ReachOut America) into a single domestic MTS service category. As the Further Notice correctly observes (¶ 41), retaining the time-of-day categories no longer makes sense because with the removal of commercial services from Basket 1, residential callers are now the exclusive users of basic MTS at all times of day. Moreover, access rates for basic MTS are not time-of-day sensitive. Id.

Likewise, while the Commission's proposal to adopt a 15 percent floor for within band price reductions in the new single domestic MTS service category is preferable to the current 5 percent lower band limit, AT&T has

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shows that the market is competitive, the adoption of those proposed rules would be arbitrary, capricious, and unsupported by record evidence. See 5 U.S.C. § 706.

The Commission has recognized its continuing obligation to reassess its classification of AT&T as a dominant carrier in light of changing marketplace conditions. In the Competitive Carrier Proceeding, the Commission stated that it would "be receptive to the presentation of evidence that circumstances have evolved in a manner which permits the easing of the regulatory requirements to which any carrier or class of carriers is subject."[28] Indeed, even independent of such assurances, the Commission is obligated under the Administrative Procedures Act to reconsider settled policies when the underlying factual predicate for those policies has changed, and must "explain its reasons for continuing to adhere to a particular policy when properly challenged in

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already shown that all price floors impede price competition and are unnecessary to prevent predation.

[28] Competitive Carrier Proceeding, First Report and Order, 85 F.C.C.2d at 11; see also Competitive Carrier Proceeding, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d at 350 ("[o]bviously, as the markets expand, varieties of service offerings increase, and new entry occurs, reassessments of prior determinations will be required").

a specific case."[29] Consistent with those principles, and in light of the overwhelming evidence that the interexchange market is now fully competitive, the Commission cannot adopt many of these rules because it cannot justify its persistent reliance on an obsolete, fifteen-year-old classification of AT&T as a "dominant" carrier.

The continued propriety of that classification is directly implicated by this proceeding. The apparent basis for many of the proposed rule changes is the Commission's unsupported and incorrect assumption that AT&T may have the ability to exercise market power in Basket 1 services, and could somehow engage in supracompetitive pricing for residential services.[30]

The record assembled on AT&T's reclassification motion, and recent Commission precedent, conclusively foreclose this as a basis for the proposed new rules. For example, just this year, the Commission found commercial services to be competitive, based on precisely the same kinds of evidence that AT&T has submitted here with

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[29] Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566, 1571 (D.C. Cir. 1992); see also Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992) (changes in factual or legal circumstances impose on agency an obligation to reconsider a settled policy or explain its failure to do so).

[30] See, e.g., Further Notice at ¶¶ 13, 44, 58-59.

respect to residential services. In the Commercial Services Order, the Commission found there was sufficient competition to remove commercial services from Basket 1 on the basis of (1) supply responsiveness, as shown by AT&T's competitors' sizable excess capacity;[31] (2) demand responsiveness, as shown by the amount of customer churn;[32] and (3) the decline in market share since divestiture.[33] The same considerations compel a like finding for the remainder of Basket 1. In all relevant respects, AT&T's residential services are indistinguishable from other services the Commission has declared competitive.[34] Any finding that AT&T continues to have market power in Basket 1, or that increased regulation of AT&T's Basket 1 services is necessary, would therefore be arbitrary and capricious.[35]

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[31] Commercial Services Order, 76 R.R.2d at 1380, ¶¶ 22-25.

[32] Id. at 1379-80, ¶¶ 20-21.

[33] Id. at 1379, ¶¶ 17-19.

[34] See also IXC Order, 6 FCC Rcd. at 5882-5903 (finding Basket 3 services competitive based on similar evidence).

[35] See, e.g., Connecticut Light and Power Co. v. FERC, 627 F.2d 467, 471 (D.C. Cir. 1980) (agency cannot treat two utilities in the same position in drastically different ways); see also Graphic Communications Int'l Union v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490 (D.C. Cir. 1988) (arbitrary and capricious to deviate from established precedent without reasoned explanation); Tenneco Gas v. FERC, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (agency not free to disregard facts simply because they "prove difficult or inconvenient").

II. THE PROPOSED RULES FOR "ALTERNATIVE PRICING PLANS" LACK A REASONED BASIS AND ARE CONTRARY TO LAW.

Even if continued price cap regulation were warranted (which it is not), the revisions in the treatment of AT&T's promotional rates proposed by the Further Notice should not be adopted because they are fundamentally flawed in many respects, and would be arbitrary and unworkable in many of their operational details. As a threshold matter, the proposed rules are arbitrary and inconsistent with current rules, because they do not allow APPs to last longer than 90 days, and because they categorically deny price cap credit for APPs until they are filed and become effective as permanent offerings. Thus, promotions that last only 90 days (or less) would never receive price cap credit.[36] The Further

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[36] Moreover, even APPs which are subsequently filed as "permanent" offerings will experience a delay of at least 105 days, and possibly as long as 254 days, from the date an APP is initially filed until AT&T is allowed index credit for the APP as a permanent offering. A 105 day delay would result if a filing to make the APP permanent were made on the first day after the 90-day duration of the APP, and became effective on 14 days' notice. A 254 day delay could result if the permanent filing were made on the 30th day after the 90-day duration of the APP, on 14 days' notice, and it did not become effective until after the maximum deferral period of 120 days. See Further Notice, ¶¶ 53-55. Most filings would necessarily be made on the last day of the proposed 30-day extension period because of the time required to collect demand data for the initial 90-day period, with a resultant delay of at least 134 days.

Notice provides no cogent explanation for treating APPs differently from other rate reductions, and absent such a reasoned basis the denial of full price cap credit for APPs is arbitrary and capricious.

The Court of Appeals has already underscored that such a justification is required to deny full price cap credit to AT&T's promotional filings. As the Commission is aware, from the time price cap regulation was first adopted in mid-1989, based on the needs of the marketplace AT&T filed literally hundreds of promotional tariffs lasting from less than one day to a full year, and consistently adjusted its price cap indices to reflect the impact of these promotional rate reductions in accordance with the Commission's rules mandating such adjustments.[37] However, in its Price Cap Reconsideration Order released in early 1991,[38] the Commission for the first time held that promotional filings would not qualify for price cap credits, merely because they contain "qualifying criteria" as to their duration and the classes of customers who were

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[37] See 47 C.F.R § 61.46 (requiring that "[i]n connection with any price cap tariff filing proposing rate changes, the carrier must calculate" the new Actual Price Index ("API") for the affected basket(s)) (emphasis supplied); see also 47 C.F.R. § 61.47 (same requirement as to Service Band Index ("SBI") for affected service categories).

[38] See Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd. 665 (1991) ("Price Cap Reconsideration Order").